



2004

From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context

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54 J. Legal Educ. 7-29 (2004)

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Dispute Resolution: Raising the Bar and Enlarging the Canon

Introduction

Carrie Menkel-Meadow

The articles which follow were prepared for the AALS 2003 Workshop on Dispute Resolution: Raising the Bar and Enlarging the Canon. The committee that planned the workshop sought to explore how the field of dispute resolution (born of courses in negotiation, mediation, and “alternative” dispute resolution) has expanded its focus in the last twenty years, both in disciplinary breath and scope and in subject matters taught. Twenty-one years earlier the first AALS Workshop on Dispute Resolution, held at Harvard Law School, sought to launch the field, define issues for research and exploration, and demonstrate multiple means of teaching its theoretical and practical knowledge for modern lawyers.

The 2003 workshop focused on how the field has expanded to embrace a wide variety of disciplines that inform law from outside, including economics, psychology, sociology, and philosophy, and how new issues of concern have emerged—including the roles of emotions, culture, cognition, ethics, and mindfulness—in the teaching and practice of what lawyers do when they attempt to resolve or handle disputes or negotiate transactions. The workshop was designed to focus on the past, present, and future of research and teaching issues in the field, not only for those teachers and scholars already in the field, but also for those in contiguous subjects, such as civil procedure, contracts, property, constitutional law, and clinics.

The articles published here were all presented at plenary sessions of the workshop. My article, which began the workshop, reflects on the modern history of the treatment of dispute handling as a legal process, now studied as the more multidisciplinary field of “conflict resolution,” suggesting that legal educators and scholars must broaden their conceptions of what is relevant to human dispute and transaction “handling,” both in questions conceptualized and in how dispute resolution is “operationalized” in teaching and practice. Jennifer Gerarda Brown explores the insights derived from economics generally and law and economics more specifically in terms of individual judgments, cognitive distortions and inefficiencies, and the surprising and often counterintuitive patterns of behaviors that occur when people seek to resolve disputes or effectuate deals in strategic interactions. Howard Gadlin explores

other counterintuitive findings from social science research that explores why and how people choose to dispute with each other: Why do so many young people continue to smoke although cigarette smoking is declared unhealthy? Why do some people (lawyers?) continue to enjoy disputes and conflicts as we develop more and more methods of seeking good solutions to legal disputes that the parties can consent to? Chris Guthrie and Nancy Welsh explore contributions to dispute processing from two different sides of social psychology—cognitive errors we make that undermine our notions of “rational” decision making, and the power of “fair” processes to make us believe in process, regardless of whether we win or lose, derived from empirical study of a field called procedural justice.

A second series of papers illustrates how applications of different disciplines and knowledge bases should affect the teaching and practice of dispute resolution, particularly in modern law schools. Pat Chew explores the role of both culture and “multiculturalism” in disputes that involve actors from “different” world views. Leonard Riskin examines how mindfulness and the practices of deep consciousness and reflection can make better dispute resolvers, lawyers, and human beings. Scott Peppet analyzes some of the many ethical dilemmas facing third-party neutrals and second-party negotiators as they try to be effective problem solvers for those in dispute or conflict.

The symposium also includes an article which was not presented at the workshop, but which illustrates the concerns of workshop sessions directed explicitly to teaching issues—Michael Moffitt’s article on different forms of student performance evaluations in negotiation courses. Frank Sander—for many of us the father of dispute resolution teaching and research in the law schools—concludes the symposium and reflects on where the field has been, where it is going, and what it offers by way of legal change and transformation for law, legal studies, and legal institutions.

The workshop itself explored a wide variety of issues demonstrating that both quality and subject matter of issues directly related to dispute resolution have expanded to include such areas as multiparty dispute resolution, the role of special masters in complex disputes, procedural and social justice in dispute resolution, systems design, mass torts, arbitration pedagogy, conducting and using empirical research and evaluation studies, the role of law in dispute resolution, the collaborative law movement, and the roles of ethics and emotions in negotiation and mediation. The message from these articles should be clear for legal academics: how human beings learn to live together by managing their conflicts—planning and executing the transactions and deals and trust of their relationships, both commercial and familial—is no longer a matter of simply studying legal doctrine and procedure. Learning about dispute and conflict resolution and making transactions happen implicate many disciplines, which should spur us on to consider more varied ways of teaching.

Members of the planning committee of the workshop, responsible for bringing you these rich articles, were Leonard Riskin, chair, University of Missouri—Columbia; Carol Liebman, Columbia University; James Alfini, North-

ern Illinois University; Gerald Williams, Brigham Young University; and James Coben, Hamline University. They had assistance from Christopher Honeyman, a national expert in dispute processes in a wide variety of fields, who served as consultant to the committee. Through the good offices of Gerald Williams, many of the papers presented at the workshop are collected here for your reading pleasure and—more important—to inspire you to “raise the bar and enlarge the canon” of your own teaching, whether in dispute resolution courses or in any law school course which considers how human beings come together or fall apart.

From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context

Carrie Menkel-Meadow

Legal Process, Conflict, and Justice

Although this essay traces my own intellectual journey as a teacher and scholar of “alternative dispute resolution,” it describes as well the evolution of the field of dispute resolution (rooted in legal studies) to the now broader field of conflict resolution that encompasses the study of disputes and conflicts, not only when they “come to law” in legal disputes, but in all forms of human conflict, including the interpersonal, domestic, and international. While my work began in legal disputing, it quickly moved to the more interdisciplinary study of conflict resolution when I sought better solutions to human problems than those afforded by courts or unprincipled compromises in conventional negotiation processes.

Several important themes have emerged as dispute resolution in law has expanded to include the fuller study of human conflict situations. First, although necessary and important in some cases, conventional legal processes, like adjudication and adversarial negotiation, are often inadequate for a fuller satisfaction of human needs and interests, and so we must look to other processes than traditional institutions or practices, depending on the kind of conflict or dispute at issue. With a growing availability of different kinds of processes for different kinds of matters, we are also developing a broader array of “process institutions.” This is “process pluralism” and should expand the focus of what is studied in law and jurisprudence. Second, while much of my work could be characterized as “procedural” or “process” driven, I am also concerned with exploring where our substantive solutions to human problems come from and how we can improve upon the human repertoire for

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This essay is the basis of the plenary talk delivered at the Workshop on Dispute Resolution: Raising the Bar and Enlarging the Canon at the 2003 annual meeting of the AALS. It is a modified version of the introductory essay to Carrie Menkel-Meadow, *Dispute Processing and Conflict Resolution: Theory, Practice and Policy* (Burlington, 2003).

problem solving. This is the “creativity” in human conflict resolution that I believe is necessary for our future survival. Third, developments in the parallel fields of legal dispute resolution and the more multidisciplinary conflict resolution provide us with a special opportunity to explore the correspondences, contrasts, and learning from domestic disputes and international conflicts, as we test whether particular concepts, approaches, and processes can be generalized or have only contextual validity. Finally, my work in the field of dispute and conflict resolution has always been a movement back and forth from theory development to practice, seeking what Donald Schön has called “theory-in-use”¹ and what I have called “ethical practice”—practice that is informed by theory and by morally legitimate uses. Disputes and conflicts are human constructs. We need theory to understand their causes, dynamics, and trajectories of actions and reactions, but ultimately we need practice to use conflict creatively and constructively, to make “justice” in legal terms and to make “peace” in human terms.

If recent world events have taught us anything, it is that conflict and conflicting notions of the good are inevitable for human beings. So, while many of us seek ways to establish more universal notions of the good toward which to direct our human efforts, it has, sadly, become, in the early years of the twenty-first century, more common for us to assume there will be basic value differences among us. We should, then, spend our time thinking about how we can at least develop fair and considerate processes for communicating enough with each other so that we may act with the most benefit and the least harm. Some offer hopes that “the rule of law” can be universalized as a principled way to resolve conflicts, domestically and internationally. Others of us see law as often conflictual, indeterminate, and politically contested or manipulable, or so focused on the need for regulation of the aggregate that it cannot always do “justice” in particular cases. Legal justice is not always actual justice.

The social philosopher Stuart Hampshire has recently concluded, in his book *Justice Is Conflict*, that while we may never agree about what the content of universal justice is “because there never will be such a harmony, either in the soul or in the city,” we might instead come closer to recognizing that “fairness in procedures for resolving conflicts is the fundamental kind of fairness, and that it is acknowledged as a value in most cultures, places, and times: fairness in procedure is an invariable value, a constant in human nature.”² Hampshire goes on to say—in words eloquent enough to make one feel proud of what has constituted at least half of a lifetime’s work of theorizing and practice in conflict resolution—that

[b]ecause there will always be conflicts between conceptions of the good, moral conflicts, both in the soul and in the city, there is everywhere a well-

1. See Donald A. Schön, *The Reflective Practitioner: How Professionals Think in Action* (New York, 1983); Donald A. Schön & Martin Rein, *Frame Reflection: Toward the Resolution of Intractable Policy Controversies* (New York, 1994).
2. Stuart Hampshire, *Justice Is Conflict* 4 (Princeton, 2000).

recognized need for procedures of conflict resolution, which can replace brute force and domination and tyranny.³

The existence of such an institution [for conflict resolution], and the particular form of its rules and conventions of procedure are matters of historical contingency. There is no rational necessity about the more specific rules and conventions determining the criteria for success in argument in any particular institution, except the overriding necessity that each side in the conflict should be heard putting its case ("*audi alteram partem*").⁴

[T]he skillful management of conflicts [is] among the highest of human skills.⁵

Hampshire identifies several principles which are crucial to understanding the importance of procedural justice.

1. Conflict is human and ubiquitous. Conflict is actually necessary for defining what is important about oneself and the polity to which individuals belong, and for instigating important social change (e.g., the elimination of slavery, the movements toward racial and gender equality, as well as increased democratic participation in many nations). Agreement on all human values is unlikely given human diversity, deep-seated cultural norms, and the variation of human needs and desires.

2. Even if we cannot all agree on substantive norms and goals, we can probably agree on some processes for making decisions that will enable us to go forward and act. We might have some virtually universal ideas about procedural fairness, like the ability to "make a case" and "be heard" and to have impartiality and fairness govern any decision-making process. Some might go further and suggest that some participation in the process by which decisions are made is essential to the legitimacy of a process (with or without commitments to democratic political regimes).

3. There is historical (and I would add functional) variation to what those fair procedures might be in any particular context, as long as *all* (not just "both") parties are given an opportunity to be heard on (or, I would add, participate in) decisions affecting them. This is the principle of *process pluralism* (which is of defining importance to the modern dispute resolution movement and is what distinguishes us, conflict theorists and practitioners, from more conventional jurists who often still see conventional legal processes as the only way forward to substantive justice).

4. Conflict resolution is a human skill (to be theorized about, taught, learned, and practiced) and a difficult but highly valued one at that. I would add it is more than a single skill, constituting a multidimensional set of skills, implicating abilities to listen, articulate, advocate, empathize, analyze, facilitate, create, manage, and care about people and their problems, issues, values, and material well-being.

3. *Id.* at 5.

4. *Id.* at 18.

5. *Id.* at 35.

Process Pluralism

Yet, if procedural justice is important to modern justice seekers, it is also important to recognize that particular processes do affect outcomes. This is what drew me away from focusing on limited legal remedies to thinking more broadly about substantive problem solving and conflict resolution in deeper and richer sociological and psychological contexts.⁶ While process pluralism allows us to choose different processes for functional or other reasons, we must also consider that the choice of a particular process will almost certainly affect the outcome we produce. This is the basic principle of my own work in negotiation: to choose an adversarial process, whether litigative or negotiable, is to limit the field of possible outcomes to distributive arrangements (binary or zero or negative sum solutions, stalemates, or unprincipled compromises). To choose another process may allow for more creative, joint-gain, wealth-creating, and satisfactory possibilities to emerge.⁷ Thus, process pluralism has both a darker and a lighter side. While more choices of process might appear to improve substantive outcomes, especially with more party participation, each process produces its own morality (an insight we owe to legal philosopher and practitioner Lon Fuller⁸) and structures its own solutions and outcomes. Critics suggest that coercive pushes toward participatory processes seeking consensus and false “harmony” may be just as unjust as the harder-edged and more hierarchical conventional institutions.⁹

With increasing sensitivity to the notion that different processes produce different outcomes, modern analysts are now looking at how particular conflict and dispute resolution or democratic processes (rational-principled vs. preference trading-bargaining, open vs. closed, plenary vs. committee) produce different results, even in such value-laden deliberations as constitution making¹⁰ and in such complex settings as private and governmental organizations, as well as in both private and public international settings.

For me, a focus on how we deal with human conflicts in a wide range of contexts (from the individual to the dyadic; group, organizational, social, and relational; commercial as well as political; local, domestic, and international) raises issues of inevitable tensions among and between the very values about which we have conflicts. Can peace be achieved without justice? Can justice be achieved without peace? Is law a proper measure of justice? If not law, what is?

6. See Carrie Menkel-Meadow, *Legal Negotiation: A Study of Strategies in Search of a Theory*, 1983 *Am. B. Found. Res. J.* 905.
7. See Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 *UCLA L. Rev.* 754 (1984).
8. For the full collection of Fuller's essays on legal process variations and the internal and separate “integrity” of each process, see Lon L. Fuller, *The Principles of Social Order: Selected Essays of Lon L. Fuller*, rev. ed., ed. Kenneth I. Winston (Oxford, 2001) (1981).
9. See, e.g., Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-form Dispute Ideology*, 9 *Ohio St. J. on Disp. Resol.* 1 (1993).
10. See Jack Rakove, *The Great Compromise: Ideas, Interests and the Politics of Constitution Making*, 44 *Wm. & Mary L. Rev.* 424 (1987); Jon Elster, *Strategic Uses of Argument*, in *Barriers to Conflict Resolution*, eds. Kenneth J. Arrow et al. (New York, 1995); Dana Lansky, *Proceeding to a Constitution: A Multi-Party Negotiation Analysis of the Constitutional Convention of 1787*, 5 *Harv. Negot. L. Rev.* 279 (2000).

How much should individual or group parties be able to craft their own arrangements or agreements to proceed with social, economic, and political life without consideration of the effects of their arrangements on others? Must all dispute or conflict resolution be accountable to those outside of the dispute itself? When is a “dispute” between two parties really a “polycentric” conflict, affecting others, or implicating more enmeshed social values? If there is process pluralism, how are we to judge if the “proper” process has been chosen for the particular matter at hand? These are some of the questions to be explored.

Like Stuart Hampshire, I believe in procedural justice as justice because we need ways to talk to and struggle with each other about how to move forward when we disagree. Unlike Stuart Hampshire, I do not adopt the streamlined and universalized definition he gives of procedural justice as reducing to “the adversary principle” of (merely) “hearing the other side.” Much of my work has been devoted to demonstrating that most disputes and conflicts do not have only two sides, either of parties or “players” (plaintiffs and defendants) or “issues” or arguments (win/lose, yes/no). In our postmodern and fractured world, many disputes and conflicts are, in fact, characterized by complicated issues (e.g., resource allocation), multiple-party responsibility (are we past single fault attributions and simplistic causal assumptions in law yet, or do we lag so far behind science?), and generational and other “third-party” impacts (for example, in environmental and family dissolution matters). In my view, we need both new multiparty processes (beyond the outmoded two-sided adversary system¹¹) and new substantively creative solutions¹² (beyond the “limited remedial imagination of courts [and other legal institutions]”¹³) to find justice in our increasingly diverse postmodern world.

In this essay I outline the challenges, cleavages, and consensuses that have emerged as the field of dispute processing or conflict resolution has attempted to create, define, and implement institutions and processes of procedural justice. Throughout, a few important themes recur, with implications for how dispute resolution should be taught.

Of Disputes and Conflicts and Dispute Processing and Conflict Resolution

The field is now variously referred to as dispute resolution, alternative dispute resolution (assuming all processes other than adjudication are alternative), or appropriate dispute resolution (assuming functional fits of “forums to fusses”¹⁴). More broadly, conflict resolution demonstrates, in its multifarious nomenclature, its rather promiscuous or multiple-heritage ancestry. Many different intellectual disciplines have contributed basic concepts, research

11. See Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 Wm. & Mary L. Rev. 5 (1996).

12. Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?* 6 Harv. Negot. L. Rev. 97 (2001).

13. Menkel-Meadow, *supra* note 7, at 791.

14. Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 Negot. J. 49 (1994).

agendas, institutional forms, and professional roles, enactments, and practices. For purposes of some (perhaps artificial) clarity, I suggest here, as I review the history of the development of the field and its key ideas and concepts, that “disputes” and “dispute resolution” have been constituted by the legal field, and “conflicts” and “conflict resolution” by the broader pastiche of the social sciences (anthropology, political science, international relations, sociology, psychology, history, economics, and game theory) and their more multidisciplinary social activist spinoffs, such as peace studies,¹⁵ social movement theory and practice,¹⁶ and conflict resolution.¹⁷ While “disputes” may be about legal cases, conflicts are more broadly and deeply about human relations and transactions. Conflict “handling” may be both more and less involving and complicated than “dispute settlement” or “conflict management.”

The study of “dispute processing” is a sort of bridge terminology and field, having been constituted by legal anthropologists (some of whom were and are lawyers) to move the focus away from legally constructed “cases” to the broader notion of culturally and contextually embedded “disputes” having existences, before, during, and after formal legal disputes.¹⁸ This rich line of both theorizing and empirical study of dispute processing in the tradition of sociolegal studies¹⁹ has sought to study disputants, their representatives, the context and content of their disputes, and the varieties of processes chosen to “process” (not necessarily to resolve or manage) their disputes, in order to uncover what social processes and relationships, in addition to, or other than, “law,” influence what actually happens to disputes.

The sociolegal focus on “disputing processes” de-centers—but does not eliminate—law as the primary variable explaining how disputes are resolved. It was a natural derivative of the school of legal realism, which in its own time de-centered doctrine in legal studies and, indeed, provided the first generation of dispute resolution scholars and practitioners—among them Lon Fuller, Soia Mentschikoff, and Karl Llewellyn—who studied legal institutions where doctrine was made, enforced, and sometimes resisted or transformed in practice.²⁰

15. John Paul Lederach, *Preparing for Peace: Conflict Transformation Across Cultures* (Syracuse, 1995).
16. Peter Ackerman & Jack Duvall, *A Force More Powerful: A Century of Nonviolent Conflict* (New York, 2000).
17. Oliver Ramsbotham et al., *Contemporary Conflict Resolution: The Prevention, Management and Transformation of Deadly Conflict* (Cambridge, 1999); Louis Kriesberg, *Constructive Conflicts: From Escalation to Resolution* (Lanham, 1998).
18. Karl Llewellyn & E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman, 1941); Richard Abel, *A Comparative Theory of Dispute Institutions in Society*, 8 *Law & Soc’y Rev.* 217 (1973); William L. F. Felstiner, *Influences of Social Organization on Dispute Processing*, 9 *Law & Soc’y Rev.* 63 (1974); William L. F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 *Law & Soc’y Rev.* 631 (1980–81); *The Disputing Process: Law in Ten Societies*, eds. Laura Nader & Harry F. Todd Jr. (New York, 1978).
19. See 15 *Law & Soc’y Rev.* 391 (1980–81) (special issue on dispute processing and civil litigation).
20. See Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 *Ohio St. J. on Disp. Resol.* 1 (2000).

The study of conflict and conflict resolution clearly predates the focus on disputes and dispute resolution institutions in the law. Sociologists such as Emile Durkheim, Karl Marx, Georg Simmel,²¹ and Lewis A. Coser²² were interested in both the structure and function of various forms of conflict in society. It was sociologists who first argued for the constructive role of conflict and the positive social change dimensions of conflict in society.

Social psychologists took up the study of conflict, in both its “destructive” and “constructive” forms,²³ as they focused on both individual and group behaviors in preventing, making, escalating, resolving, and reconciling conflict.²⁴ A different group of social psychologists studied and created a new field, “procedural justice,” which empirically examined differences with respect to expectations and performances in different process settings (contrasting, for example, adversarial structures with inquisitorial ones,²⁵ and mediation and arbitration forms with adjudication). These social scientists have documented that participants in dispute resolution processes have a strong desire for “procedural fairness” that may be more robust than their satisfaction or concerns about actual outcomes.²⁶

Social psychologists have more recently focused on how human cognitive errors both produce conflict and prevent us from resolving conflicts in rational and efficient ways, identifying a group of heuristic and strategic errors we make in processing information and forming preferences when we interact with others.²⁷

Sociologists and social psychologists together have produced a variety of typologies and taxonomies of types of conflicts, specifying such variations as material vs. nonmaterial (value- or needs-based) conflicts; perceptual, behavioral, and attitudinal conflicts; malleability or changeability of the *res* in conflict; numbers of parties in conflict (dyadic vs. multiparty); intergroup

21. Conflict and the Web of Intergroup Affiliations (New York, 1955).

22. The Functions of Social Conflict (Glencoe, 1956).

23. Morton Deutsch, *The Resolution of Conflict: Constructive and Destructive Processes* (New Haven, 1973); Kurt Lewin, *Resolving Social Conflicts* (New York, 1948).

24. Dean G. Pruitt & Jeffrey Z. Rubin, *Social Conflict: Escalation, Stalemate and Settlement* (New York, 1986).

25. E. Allen Lind & Tom R. Tyler, *The Social Psychology of Procedural Justice* (New York, 1988); John Thibaut & Laurens Walker, *Procedural Justice: A Psychological Analysis* (Hillsdale, 1975).

26. E. Allen Lind et al., In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System, 24 *Law & Soc'y Rev.* 953 (1990).

27. See Barriers to Conflict Resolution, *supra* note 10; James Reason, *Human Error* (Cambridge, 1990); Richard Nisbett & Lee Ross, *Human Inference: Strategies and Shortcomings of Social Judgment* (Englewood Cliffs, 1980); Lee Ross & Richard E. Nisbett, *The Person and the Situation: Perspectives of Social Psychology* (Philadelphia, 1991); *Judgment Under Uncertainty: Heuristics and Biases*, eds. Daniel Kahneman et al. (Cambridge, 1982); Max H. Bazerman & Margaret A. Neale, *Negotiating Rationally* (New York, 1992); Max H. Bazerman, *Judgment in Managerial Decision Making*, 5th ed. (New York, 2002).

(e.g., nation-state) vs. intragroup (organizational) conflicts; and intrapersonal vs. interpersonal conflicts. Efforts at cataloging types of conflicts, replicated in political science for both domestic and international disputes and conflicts, and now law, are based on the rationalistic hopes that taxonomies of characteristics will enable us to collect data, identify patterns or “indicators,” and make predictions for the trajectory of a conflict and perhaps for its “treatment” in various forms of prescriptive conflict resolution interventions.

Cultural variations in how conflicts are defined, experienced, and acted on have engaged anthropologists since at least the nineteenth century.²⁸ Now the old debates about cultural differences have reared their heads again in claims of “clashes of civilizations,” both in the definitions of and the “processing” (including interpretation or “meaning making”) of conflicts, at nation-state, cultural, ethnic, religious, group, and individual levels.²⁹ Some of our Americanized—“newer”—forms of dispute resolution are derived from older forms in other cultures and, some would say, lose something in the translation, derived from African moots³⁰ or Asian mediation³¹ even as they try both to adopt new cultural forms and “mediate” cultural diversity within one nation and its internal disputes.³²

International relations theorists, who were among the first to formally study negotiation processes (along with game theorists and mathematicians, developing models for strategic interactions in war and Cold War settings), have reemerged as organizers of both theoretical and empirical propositions to test in modern international crisis³³ (see, e.g., the role of deadline and “ripeness” in dispute settlement³⁴). Roger Fisher, key developer of the “principled negotiation” model of integrative negotiation in *Getting to Yes*,³⁵ although a law professor at the time, developed many of his insights from international and diplomatic service in the U.S. State Department.³⁶

28. Kevin Avruch, Type I and Type II Errors in Culturally Sensitive Conflict Resolution Practice, 20 Conflict Resol. Q. 351 (2003); Kevin Avruch, *Culture and Conflict Resolution* (Washington, 1998).

29. Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York, 1996).

30. P. H. Gulliver, *Disputes and Negotiations: A Cross-Cultural Perspective* (New York, 1979).

31. Stanley B. Lubman, Dispute Resolution in China After Deng Xiaoping: “Mao and Mediation” Revisited, 11 Colum. J. Asian L. 229 (1997).

32. *The Conflict and Culture Reader*, ed. Pat K. Chew (New York, 2001).

33. *Herding Cats: Multiparty Mediation in a Complex World*, eds. Chester A. Crocker et al. (Washington, 1999) [hereinafter *Herding Cats*]; *Turbulent Peace: The Challenges of Managing International Conflict*, eds. Chester A. Crocker et al. (Washington, 2001) [hereinafter *Turbulent Peace*].

34. I. William Zartman, *Ripe for Resolution: Conflict and Intervention in Africa* (New York, 1985); Robert Malley & Hussein Agha, *Camp David: The Tragedy of Errors*, N.Y. Rev. Books, Aug. 9, 2001, at 59; George J. Mitchell, *Making Peace* (New York, 1999).

35. Roger Fisher et al., *Getting to Yes: Negotiating Agreement Without Giving In*, 2d ed. (Boston, 1991).

36. Roger Fisher, *International Conflict for Beginners* (New York, 1969).

Looking at choices about how to behave in conflict situations, theorists (from game theory, mathematics, economics, and political science)³⁷ have inspired both laboratory and empirical studies of strategic behavior and interaction, focusing on how participants in a conflict or dispute situation respond to their own inner needs and interests, those of clients or principals (in representative settings³⁸), and to the “others” (adversaries or partners) in settings where more than one person is needed to coordinate action or respond to a conflict. Some of the earliest and best work in conflict theory has been derived from organizational management,³⁹ labor relations,⁴⁰ and the applied sciences of decision making⁴¹ and problem solving.⁴²

A new turn in political theory and practice, with implications (see below) for legal dispute resolution, has focused on processes that foster democratic discourse and enhance opportunities for participation in decisions that affect the polity. Informed by the moral and social philosophy of Jürgen Habermas seeking “ideal speech conditions,”⁴³ this new theory attempts to describe alternative processes to maximize citizen participation in policymaking and resolution of contested disputes where inevitable value differences occur with increasingly diverse populations. Political theorists⁴⁴ and policy activists⁴⁵ have

37. E.g., John von Neuman & Oscar Morgenstern, *Theory of Games and Economic Behavior* (Princeton, 1944); Thomas C. Schelling, *The Strategy of Conflict* (Cambridge, Mass., 1960); R. Duncan Luce & Howard Raiffa, *Games and Decisions: Introduction and Critical Survey* (New York, 1957); John F. Nash, *The Bargaining Problem*, 18 *Econometrica* 155 (1950); John F. Nash, *Two-Person Cooperative Games*, 21 *Econometrica* 128 (1953); Robert Axelrod, *The Evolution of Cooperation* (New York, 1984); Steven J. Brams & Alan D. Taylor, *Fair Division: From Cake-Cutting to Dispute Resolution* (Cambridge, 1996).
38. *Negotiating on Behalf of Others: Advice to Lawyers, Business Executives, Sports Agents, Diplomats, Politicians, and Everybody Else*, eds. Robert H. Mnookin & Lawrence E. Susskind (Thousand Oaks, 1999); Carrie Menkel-Meadow, *Lawyer Negotiations: Theories and Realities—What We Learn from Mediation*, 56 *Mod. L. Rev.* 361 (1993).
39. Mary Parker Follett, *Constructive Conflict*, in Mary Parker Follett: *Prophet of Management: A Celebration of Writings from the 1920's*, ed. Pauline Graham (Boston, 1996); Robert Rogers Blake, *Managing Intergroup Conflict in Industry* (Houston, 1964); K. Thomas, *Conflict and Conflict Management*, in *Handbook of Industrial Organizational Psychology*, ed. M. D. Dunnette 889 (Chicago, 1976).
40. Richard E. Walton & Robert B. McKersie, *A Behavioral Theory of Labor Negotiations: An Analysis of a Social Interaction System* (New York, 1965).
41. John S. Hammond et al., *Smart Choices: A Practical Guide to Making Better Decisions* (Boston, 1999); Gary Klein, *Sources of Power: How People Make Decisions* (Cambridge, 1999); Richard J. Zeckhauser et al., *Wise Choices: Decisions, Games, and Negotiations* (Boston, 1996).
42. James L. Adams, *Conceptual Blockbusting: A Guide to Better Ideas* (Reading, 1974).
43. Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, Mass., 1996); Jürgen Habermas, *Discourse Ethics*, trans. Christian Lenhardt & Shierry Weber Nicholsen, in *Moral Consciousness and Communicative Action* (Cambridge, 1990); Jürgen Habermas, 1 & 2 *The Theory of Communicative Action* (Boston, 1984).
44. Robert A. Dahl, *On Democracy* (New Haven, 1998); Amy Gutmann & Dennis Thompson, *Democracy and Disagreement* (Cambridge, Mass., 1996); Jane Mansbridge, *Beyond Adversarial Democracy* (New York, 1980); James Bohman, *Public Deliberation: Pluralism, Complexity, and Democracy* (Cambridge, Mass., 1996); James S. Fishkin, *Democracy and Deliberation: New Directions for Democratic Reform* (New Haven, 1991).
45. Carmen Sirianni & Lewis Friedland, *Civic Innovation in America: Community Empowerment, Public Policy, and the Movement for Civic Renewal* (Berkeley, 2001); Lawrence Susskind & Liora Zion, *Can America's Democracy Be Improved?* (N.D.)

suggested new ways for developing alternative processes to our formally constitutionalized governmental institutions of executive, legislative, and judicial power: ad hoc policymaking groups,⁴⁶ negotiated rule making,⁴⁷ regionalized or substantively organized decision making,⁴⁸ and “public conversations” that seek to enhance human understanding, if not effectuate particular outcomes or agreements⁴⁹—all based on different notions of “negotiated” agreements of the polity.

To the extent that the new multidisciplinary field of conflict resolution⁵⁰ has been born out of these different disciplines, there is an interesting mix of individual, organizational, theoretical, empirical, and professional levels of theory, practice, and policy. Conflict resolution theory, research, and practice now focus on the development of professionals in negotiation, mediation, facilitation, consensus building, and other conflict resolution skills; the empirical study of particular kinds of conflicts (domestic, as well as international); and the institutional design and evaluation of particular approaches to structuring conflict resolution or management.

Legal Processes, Legal Institutions, and the Law in Conflict Resolution

It was precisely because the legal field’s focus on “legal disputes” or cases was so narrow and explained so little that I first began to think and write about legal disputes and the search for justice in a broader disciplinary framework.⁵¹ As a practicing lawyer for the poor and then as a legal clinician teaching law students how to be lawyers, I was struck by the insufficiency of legal remedies at solving clients’ underlying problems and addressing underlying needs.⁵² Legal disputes were a much narrower subset of actual human, social, political, and economic conflicts.

In order to understand how legal disputes might better be resolved, I turned to a number of different disciplines (sociology, political science, psychology, economics, mathematics, game theory, international relations, and the newer peace studies and conflict resolution) for theoretical frameworks to help me understand how human problems were resolved in realms outside of law. My essay “Legal Negotiation: A Study of Strategies in Search of a Theory” was a review of this literature, both scholarly and popular, to

46. The Consensus Building Handbook: A Comprehensive Guide to Reaching Agreement, eds. Lawrence Susskind et al. (Thousand Oaks, 1999) [hereinafter Consensus Building Handbook].

47. Philip J. Harter, Negotiating Regulations: A Cure for Malaise, 71 Geo. L.J. 1 (1982); Jody Freeman, Collaborative Governance in the Administrative State, 45 UCLA L. Rev. 1 (1997).

48. Michael C. Dorf & Charles F. Sabel, A Constitution of Democratic Experimentalism, 98 Colum. L. Rev. 267 (1998); Judith S. Kaye, Changing Courts in Changing Times: The Need for a Fresh Look at How Courts Are Run, 48 Hastings L.J. 851 (1997); Greg Berman & John Feinblatt, Problem Solving Courts: A Primer, 23 Law & Pol’y Q. 125 (2001).

49. Michelle LeBaron & Nike Carstarphen, Finding Common Ground on Abortion, in Consensus Building Handbook, *supra* note 46.

50. Kriesberg, *supra* note 17; The Handbook of Conflict Resolution: Theory and Practice, eds. Morton Deutsch & Peter T. Coleman (San Francisco, 2000).

51. Menkel-Meadow, *supra* note 6.

52. Menkel-Meadow, *supra* note 7.

demonstrate that other fields had gone much further than law, jurisprudence, and even the newer clinical study of law to develop models and frameworks for studying negotiation processes for human dispute resolution and problem solving.⁵³

The strategic work of game theorists to understand interactions of, first, two parties, and then, more than two parties, in situations of perfect, mixed, or no information seemed to have great resonance for legal disputes, which, culturally at least, are most often conceived of as competitive, distributive games of allocation of limited resources (mostly money in lawsuits, but also stock, land, and even children in child custody cases, and other “tangibles” that might not be divisible at all). Strategic moves to maximize money or tangibles, on behalf of a client, seemed the lawyer’s most common default behavior, based on assumptions of resource scarcity and goals of client maximization. If the law’s purpose was to declare right and wrong, then disputes resolved in legal institutions, like courts or legislatures, were likely to have binary outcomes (or compromises—typically split-the-difference compromises—based on binary claims). The job of the conventional adversarial lawyer, like the payoff-maximizing game player, was to gather as much of the goods or goodies for the client as possible. Advocacy in court was seen as directly transferable to adversarial persuasion techniques in negotiation, where only the audience differed.⁵⁴

From a broader perspective, much of this emphasis on competitive strategies in negotiation mirrored strategic, if deterrent, approaches to larger political conflicts in the Cold War era. Many social commentators have suggested that although law may be the leading “adversarial” institution, much in Anglo-American culture is based on adversary argument, from the media to politics to education to gender relations.⁵⁵ Social psychologists, labor negotiators, organizational development specialists, and anthropologists, however, focused on a broader catalog of human behavior, suggesting, at the very least, that there was a greater variety of human approaches to negotiated problems, differentiating integrative possibilities (substantive “trades” of differentially valued items) with use of different human interactional processes (cooperation, collaboration, and adaptation⁵⁶).

I studied this multidisciplinary literature for insights into two aspects of dispute and conflict resolution in law that remain present in my work today: (1) dispute resolution involves both *process* and *substance*, and (2) these elements of any human problem interact and are constitutive of each other. Thus, to the extent that one considers the *res* of a problem to be an indivisible tangible item or an uncompromisable principle or belief, then competition is

53. Menkel-Meadow, *supra* note 6.

54. See, e.g., Herb Cohen, *You Can Negotiate Anything: The World’s Best Negotiator Tells You How to Get What You Want* (Secaucus, 1980).

55. Deborah Tannen, *The Argument Culture: Moving from Debate to Dialogue* (New York, 1998).

56. P. Terrence Hopmann, *Bargaining and Problem Solving: Two Perspectives on International Negotiation*, in *Turbulent Peace*, *supra* note 33.

likely to be the process chosen. In turn, this choice of process (adversarialism or competition) will affect (and limit) the possible outcomes to binary, compromised, or stalemated or impasse solutions.⁵⁷ Different orientations, mindsets, frameworks, approaches, or assumptions (after analysis about the *res*, the number of parties, etc.) about what the matter is about⁵⁸ should cause the skilled negotiator to choose appropriate processes (to be enacted in the *artful* practice or behavioral aspects of conflict resolution) for the kind of matter at hand.

In short, as I have now written many times (and taught thousands of students over the years), conflict resolution involves both *cognitive* (the “science” or analysis of any conflict or dispute) and *behavioral* (the “art” and practice of conflict resolution and problem solving) components. We must learn to analyze and understand what conflicts and disputes are about, in their full contextual complexity,⁵⁹ before we can choose the appropriate behavioral response. Once we have decided on our goals and desired outcomes, we can seek to achieve them with a broader repertoire of processes and behaviors (whether goals are defined as maximizing individual or joint gain, or seeking Pareto-optimal or “just” solutions). That broader repertoire of behaviors (communication skills, creative problem solving, questioning, as well as persuading, listening, synthesizing, as well as analyzing) can and must be taught.⁶⁰ Legal problem solving is not just about adversarial argument or persuasion about what is “right” for the client; it is about understanding a range of possible goals for clients and those with whom they interact, and seeking both substantive outcomes and appropriate processes to satisfy the needs and interests of clients and those engaged in activity with the client.

But mere analysis of the status quo was not all that I had in mind. In one of those wonderful moments of intellectual convergence (more pretentiously described as a “paradigm shift” in the sociology of science⁶¹), many critics of the legal system were focused not only on the increasing costs and delays of the litigation system⁶² (what I have labeled the “quantitative” approach to legal conflict resolution), but on the quality of the solutions or resolutions produced by court orders or settlements negotiated in their “shadow.”⁶³ At about

57. See Menkel-Meadow, *supra* note 7, at 760.

58. On the “science” of negotiation, see Howard Raiffa, *The Art and Science of Negotiation: How to Resolve Conflicts and Get the Best Out of Bargaining* (Cambridge, Mass., 1982); Howard Raiffa with John Richardson & David Metcalfe, *Negotiation Analysis: The Science and Art of Collective Decision-Making* (Cambridge, Mass., 2002).

59. Including a variety of contextual factors specified in Menkel-Meadow, *supra* note 6, at 927–28.

60. Carrie Menkel-Meadow, *supra* note 12; Carrie Menkel-Meadow, Taking Problem Solving Pedagogy Seriously, 49 J. Legal Educ. 14 (1999); Carrie Menkel-Meadow, Narrowing the Gap by Narrowing the Field: What’s Missing from the MacCrate Report—Of Skills, Legal Science and Being a Human Being, 69 Wash. L. Rev. 593 (1994); Carrie Menkel-Meadow, To Solve Problems, Not Make Them: Integrating ADR in the Law School Curriculum, 46 SMU L. Rev. 801 (1993).

61. Thomas S. Kuhn, *The Structure of Scientific Revolutions* (Chicago, 1970).

62. Frank E. A. Sander, Varieties of Dispute Processing, 77 F.R.D. 111 (1976).

63. Robert H. Mnookin & Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L. Rev. 950 (1979).

the same time that I sought to reorient lawyers to a “problem-solving” approach to negotiation,⁶⁴ Roger Fisher and the newly created Program on Negotiation at Harvard University focused on “principled negotiation”⁶⁵ to develop models for negotiators to successfully pursue joint gain and agreements that are wise and efficient and improve—rather than destroy—relationships by looking for different kinds of “solutions” to legal, social, political, and economic problems. I called it “creative problem-solving,” but in more technical disciplinary terms this work asked lawyer-negotiators who had cultural default assumptions about scarce resources and competitive behaviors to think instead in terms of integrative solutions and wealth-creating rather than wealth-destroying solutions (the negative-sum games of litigation and sunk transaction costs).

In trying to reorient lawyers to a different set of assumptions about legal problems, expanding and enhancing their substantive problem-solving skills, I found that while others had gone before me, both inside and outside law, lawyers seemed to need to be reminded of this important work. At the level of searching for creative ways to manage conflict, to seek integrative solutions, and to create pie-expanding rather than pie-diminishing solutions (I use many food metaphors in my work!), the early work of administrative scientist Mary Parker Follett and related work in labor-management relations⁶⁶ were key. Foundationally significant were social psychologists Abraham Maslow⁶⁷ and George Homans,⁶⁸ whose important work suggested that basic human needs must be met for human flourishing and may be complementary for different human beings, rather than always conflicting, for satisfactory human interaction and problem solving.

At the level of process, the legal realists—Lon Fuller, Soia Mentschikoff, and Karl Llewellyn, among others—suggested that different legal processes and institutions (adjudication, arbitration, mediation, and “common business practices” or social norms) served different functions and produced different kinds of outcomes (often with their own jurisprudential justifications, integrity, or “morality”). I trace these and other earlier “roots” of modern legal dispute resolution theory in “The Mothers and Fathers of Invention: The Intellectual Founders of ADR.”⁶⁹ My aspiration has been to continue this work to add other processes to the mix (negotiation, facilitation, consensus building, and other multiparty processes) to analyze, understand, and implement both process values (more participation and legitimacy of result) and substantive justice values (better “quality” and more tailored and creative solutions to legal problems).

64. Menkel-Meadow, *supra* note 7.

65. Fisher et al., *supra* note 35; Raiffa, *supra* note 58; David A. Lax & James K. Sebenius, *The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain* (New York, 1986).

66. Walton & McKersie, *supra* note 40.

67. Abraham Harold Maslow, *The Farther Reaches of Human Nature* (New York, 1971).

68. George Caspar Homans, *Social Behavior: Its Elementary Forms* (New York, 1961).

69. Menkel-Meadow, *supra* note 20.

Viewing negotiation as one of the foundational blocks (in both theory and practice) of good dispute resolution, I have focused on some counter-legal/cultural notions. While compromise or a split-the-difference solution between two high and opposite offers or demands is a common approach to traditional legal negotiations (and, sadly, serves as the model for what is called Lloyds of London settlement brokerage by judges in judicial settlement conferences⁷⁰), compromise is often an unprincipled result in legal negotiations where parties or lawyers fail to explore the full panoply of their various needs and interests, including legal, economic, social, psychological, emotional, moral, political, and religious.⁷¹

Although Fisher, Ury, and Patton's template focuses on going behind "positions" to look for parties' real "interests," which can often be met by "efficient trades" of compatible, but not conflicting, interests (e.g., different valuations of time, money, things, tax leveraging), I have urged a focus on "needs" (in my case, from a feminist focus on human needs, but compatible with John Burton's focus on human needs in the international dispute context⁷²). As "needs" may stand behind or "under" even interests (often self-proclaimed and still assumed to be mostly economistically instrumental), the lawyer can probe for (in interviews and other interactions with the client⁷³) longer-term needs beyond the short-term, case-based "interests." The lawyer may help uncover the needs of the client and other affected third parties. This broader, social welfare (if perhaps somewhat maternalistic) approach to determining what actually may be at issue in a dispute is consistent with the approach of many mediators and conflict resolvers to go beyond the "framed" dispute to look at what the underlying conflict is really about and "reframe" it. With a deeper and perhaps longer list of "needs," efficient trades continue (perhaps there are more or fewer of them), but parties and their lawyers can attempt to negotiate for deeper and ultimately more stable satisfaction among the parties. Here, "compromise" is often only a last resort, after principles and satisfaction or "trades" of needs are fully pursued or, in the language of conventional bargainers, "exploited."

As I have argued elsewhere,⁷⁴ compromise need not be seen as anathema to jurists who view principle and law as the sole measure of justice. John Coons argued quite eloquently, long before the current work in legal dispute resolution, that some legal matters are not capable of binary solutions (e.g., child custody, now institutionalized in joint legal custody; comparative fault, now institutionalized in comparative negligence regimes; and mixed questions of law and fact with mixed legal responsibility or factual uncertainty, the

70. See Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. Rev. 485 (1985).

71. See Menkel-Meadow, *supra* note 7.

72. See *Conflict: Human Needs Theory*, ed. John Wear Burton (London, 1990).

73. See Carrie Menkel-Meadow, *The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us*, 2 Mo. J. Disp. Resol. 25 (1985).

74. Carrie Menkel-Meadow, *Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 Geo. L.J. 2663 (1995).

jury compromise), and so in some cases compromises or negotiated resolutions are actually more “just” than more extreme binary solutions, precisely because of their distributed “precision.”⁷⁵ I have argued a somewhat related point that while legal principles (especially statutory law, passed by legislatures for the “average,” “aggregate,” or “typical” situation) may serve as “general” justice, in particular cases justice may better be served by tailored “departures” from the general rule (as long as the negotiated solutions are not otherwise unlawful).⁷⁶ Negotiated justice may, then, for the individuals involved, be more “just” than legislated or court-ruled justice.

To the extent that negotiation and mediation, with their assumptions of compromised results, have often appeared distasteful to principled and pure jurists, more recent extensions of some of Lon Fuller’s work have usefully explored the internal (and external) integrity of both such processes and such outcomes. Where issues or items are multifaceted or value is embedded or connected in a web of other issues or parties (as in Fuller’s classic division of an art collection⁷⁷), trades, tailor-made solutions, or contingent agreements, linking past to future in dynamic and changeable solutions, are often preferable to rigid, past-focused adjudication of “rights and responsibilities” from rigid legal principles. At the macrosocietal level, even the much derogated Machiavelli has much to teach us about the value of compromise.⁷⁸ To hold the polity together, the prince or leader (or lawyer) may not be too “virtuous” (or principled) himself; it is his job to hold together a widely divergent population with outcomes or solutions that are satisfactory to most of the people most of the time, and he must, above all, be flexible. The politician, who must work with others with different values from his, like the lawyer, must consider long-term goals, future “deals,” and the peace and harmony of the larger community. To compromise is often to apprehend and recognize the reality of the needs of the “other.”⁷⁹

Thus, in modern negotiation theory, consideration of “the other” is as important as consideration of gain for one’s principal. “Getting to Yes” means creating conditions so that the “other” will want to do what you ask of him, by providing him with enough gain or needs satisfaction to render an agreement better than the condition of no agreement at all. In negotiation parlance, the negotiated agreement must be better than the BATNA (the Best Alternative To a Negotiated Agreement). Focus on achieving joint gain, then, inspires the good negotiator to be creative and look for substantive solutions that are satisfactory or welfare enhancing for all parties. This is why working on mutually agreed-to (truly *consented-to*) solutions seems so much more appealing to me than the coerced or commanded outcomes of formal legal institu-

75. John Coons, *Compromise as Precise Justice*, in *NOMOS XXI Compromise in Ethics, Law, and Politics*, eds. J. Roland Pennock & John W. Chapman, (New York, 1979) [hereinafter *NOMOS XXI Compromise*]; John Coons, *Approaches to Court-Imposed Compromise—The Uses of Doubt and Reason*, 58 *Nw. L. Rev.* 750 (1964).

76. Menkel-Meadow, *supra* note 74.

77. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 *Harv. L. Rev.* 353, 394 (1978).

78. Niccolo Machiavelli, *The Prince*, trans. George Bull, 90–92, 101 (Baltimore, (1961)).

79. Martin Golding, *The Nature of Compromise*, in *NOMOS XXI Compromise*, *supra* note 75.

tions, which, even when ordering “just results,” are so often resisted by hostilely defeated parties. (Though I would never argue that *Brown v. Board of Education* was not a necessary court decision that enunciated an important social and constitutional norm of nondiscrimination, its failure to be immediately complied with is a product of resistance (and, sadly, popular will) to a commanded court order.)

Much of negotiation and other nonadjudicative forms of legal dispute resolution, thus, are justified on philosophical and political grounds of consent. The claim made on behalf of such nonadjudicative forms of dispute resolution is that when commands from government-sponsored institutions, like courts, are not required, decisions reached by the parties themselves or facilitated by “wise elders” (as in many forms of mediation)⁸⁰ will have greater legitimacy and longevity as the product of the parties’ own agreements, rather than commanded from on high.

This key underlying value of “consent” is itself contested, as many commentators have suggested that negotiation is more often a product of the power (economic, legal, social, or other “endowments”) that parties bring to the negotiation, and thus may not always reflect “principled” negotiation, problem-solving impulses, or even “fair trades.”⁸¹ For such critics, the use of private negotiation or now the more institutionalized forms of ADR (mediation, arbitration, and related processes) may be dangerous because there is no state supervision to ameliorate such power imbalances and to assure that important legal principles are followed. Issues of social differences in negotiated processes, including race,⁸² gender,⁸³ and class,⁸⁴ have also called into question the idea that negotiation can really serve disempowered parties to create value or make better outcomes than they would receive in more formal legal institutions.

As a feminist, I have been a sympathetic participant in these critiques, but I have also argued the important point that alternatives to litigation must be measured against the fairness and power distributions in more conventional litigation venues. So, in various articles, I have talked about the “baseline” problem of being clear about what is being measured against what.⁸⁵ In my parlance, “litigation romanticists” often presume equality of legal resources

80. Martin Shapiro, *Courts: A Comparative and Political Analysis* 80 (Chicago, 1981).

81. See, e.g., Tina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 *Yale L.J.* 1545 (1991); Owen Fiss, *Against Settlement*, 93 *Yale L.J.* 1073 (1984); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 *Wis. L. Rev.* 1359.

82. Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 *Harv. L. Rev.* 817 (1991).

83. Deborah M. Kolb & Judith Williams, *The Shadow Negotiation: How Women Can Master the Hidden Agendas That Determine Bargaining Success* (New York, 2000).

84. Iris Marion Young, *Activist Challenges to Deliberative Democracy*, 29 *Pol. Theory* 670 (2001).

85. See, e.g., Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 *UCLA L. Rev.* 1871 (1997); Menkel-Meadow, *supra* note 74.

(both money and competency) or judges willing to step out of their passive role to ensure equal representation of all parties. Litigation, in my view, is no more likely than alternatives to litigation to produce complete “fairness.” We do not yet have definitive empirical studies of these matters, as it is virtually impossible to subject the same case to two different treatments (litigation or some alternative) to test which outcomes are “better” (even if we could agree on appropriate metrics). Is a “better” or “fairer” solution one that tracks the law? Redistributes resources equitably among the parties? Maximizes joint gain for the parties? Causes the least harm to the parties or those outside the dispute? Or maximizes gain (or provides clearer precedent) for those outside of the dispute? Alas, in my view, while game theory permits easier measurement of payoff schemes (especially in distributive games, but also in integrative games), the real legal world must consider not only the game players, but also those affected by the game (the “human externalities” of any dispute) and the longer-term effects on the system itself.

From Dyadic Negotiation to Mediation and Multiparty Processes

It is precisely because I have argued that we will never be able to fully answer the question of whether litigation or particular forms of alternatives to litigation (and there are many of them) are always “better” or “fairer” or “more just” that I have followed in the path of Lon Fuller, and my own sociological training, to suggest that it might give us greater explanatory purchase to study the conditions under which particular forms or institutions of process might be more advantageous than others. Thus, as the study of negotiated solutions expanded to suggest facilitated negotiation (mediation) when the parties are unable to craft their own solutions, I examined the different forms that mediation, like negotiation, might take in different contexts.⁸⁶

When parties negotiate (even when attempting to solve problems or maximize joint gain), they are still subject to a host of strategic problems (e.g., the giving and getting of information, whether and when to trust others, how quickly to come to agreement versus pursuing long-term or dynamic issues in a negotiation). The use of a third-party neutral to “manage” the negotiation process, to facilitate communication, and to aid in the crafting of solutions has increased the use and study of mediation in recent decades, even in the most conventional of legal matters. Whether used in the pure Fullerian case-types of ongoing relationships (business, labor, family) or now even in one-shot small claims matters in lower courts,⁸⁷ mediation is used not only to facilitate communication and improve relations among the parties, but to prevent “waste” at the negotiation table and to produce more Pareto-optimal solutions.

Like the efforts to categorize and generalize about different frameworks or mindsets in negotiation, mediation has also been subjected to efforts at taxonomies and typologies. Pure mediators are “facilitators” (of human communication, negotiation techniques) but never “decide” anything for the

86. Menkel-Meadow, *supra* note 73; Carrie Menkel-Meadow, Negotiating with Lawyers, Men and Things: The Contextual Approach Still Matters, 17 *Negot. J.* 257 (2001).

87. Menkel-Meadow, *supra* note 38.

parties (and are called therapeutic, by those outside of the field⁸⁸). More recently, at least in legal practice, it has been recognized that mediators, though not deciding anything, as third-party neutrals would in arbitration, may be “evaluators”⁸⁹ of parties’ claims, arguments, and the likely legal outcome should cases go to full adjudication before a judge or jury. Mediators often serve as reality testers, asking the parties to consider how realistic and reasonable their plans are for the enforcement of the agreement. Mediation, like negotiation, thus has the power to create relationships, rules, agreements, and plans for the future (unlike the backward focus of most court decisions).

Efforts to demarcate various schools of mediation, such as “transformative mediation” (“recognition and empowerment” of parties differentiated from “problem-solving/settlement” of the dispute⁹⁰), when deracinated from the context of the dispute or conflict, have seemed less useful to me than the deeper, contextually based analysis of earlier scholars like Fuller and Mentschikoff. There are different mediation technologies, techniques, practices, and approaches. For example, there are issues of more directive questioning; use of separate meetings or caucuses; whether mediators should be totally “neutral” or merely “unbiased” or actually “enmeshed” in and knowledgeable about the dispute or disputants. The more interesting question to me has been whether there are universal or generalizable principles to be used in applying these techniques to particular disputes, or whether context must determine appropriate forms and techniques. In recent work I have explored this difficult question of the generalizability of our propositional knowledge bases with respect to particular forms of dispute resolution (e.g., the role of “deadline” and privacy in both domestic and international disputes⁹¹) and in particular contexts.⁹² And, as more fully explored below, issues of techniques, practices, and forms of participation may change depending on how many parties or stakeholders are engaged in a dispute or conflict and whether the conflict is a private matter (as in many but not all lawsuits) or a question of public import (as in multiple-party class actions or governmental regulation or public policy setting).

The Morality and Legitimacy of Process: Macro and Micro Ethics Issues in Dispute Resolution

The issues surrounding appropriate use of different forms of dispute and conflict resolution depend enormously, in my view, on the context. As various forms of ADR have been institutionalized and their animating principles or

88. Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 *Law & Pol’y* 7 (1986).

89. Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 *Harv. Negot. L. Rev.* 7 (1996).

90. Robert A. Baruch Bush & Joseph P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (San Francisco, 1994).

91. Carrie Menkel-Meadow, *Correspondences and Comparisons in International and Domestic Dispute Resolution*, 18 *Negot. J.* 367 (2002); Carrie Menkel-Meadow, *Correspondences and Contradictions in International and Domestic Conflict Resolution: Lessons from General Theory and Varied Contexts*, 2003 *J. Disp. Resol.* 319.

92. Menkel-Meadow, *supra* note 86.

sensibilities have been distorted,⁹³ as in the importation of consensual dispute resolution forms to commanded and compulsory use in courts and contracts,⁹⁴ I have been raising issues about the appropriate regulations, rules, and standards⁹⁵ that should be applied when legal dispute resolution conflates compulsory legal process and coerced participation with true consent and party self-determination.⁹⁶ Using different kinds of dispute and conflict resolution processes in different contexts (personal, organizational, contractual, voluntary, litigative, compulsory, court-annexed, private, public, international) presents enormous difficulties in different expectations of roles (for third parties, disputing parties, and their lawyers,⁹⁷ and for duties owed to those affected by the dispute, as well as presenting concerns about the legitimacy of the processes used. While I have written a great deal about the specific issues of ethical practice in legal dispute resolution, including confidentiality, conflicts of interests, choice of laws, fees, accountability and liability, competence, credentialing, and candor (and participated in the drafting of several model ethics codes⁹⁸), it is not the specifics of rules that I most worry about. What I most worry about is the integrity of those seeking to help resolve conflict to choose appropriate processes for their matters and then to utilize those processes with a sense of integrity and fairness. In short, it is the foundational values, and intent of the parties, rather than the specific rules, that matter most.⁹⁹

If, as Lon Fuller suggested decades ago, each process has its own uses and “morality,” then we must exert our best efforts in theory development and practice to study what the morality of each process should be. This project has become increasingly complex as the number of processes continues to increase and hybridize (from mediation to med-arb, to early neutral evaluation in courts, to private minitrials, to public summary jury trials to minijury trials, to consensus building fora to facilitated policymaking and negotiated rule making),¹⁰⁰ thus making process-specific morality perhaps more difficult to elucidate.

93. Carrie Menkel-Meadow, Pursuing Settlement in an Adversary Culture: The Law of ADR, 19 Fla. St. U. L. Rev. 1 (1991).

94. Carrie Menkel-Meadow, Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not, 56 Miami L. Rev. 949 (2002); Carrie Menkel-Meadow, “Do the Haves Come Out Ahead” in Alternative Judicial Systems? Repeat Players in ADR, 15 Ohio St. J. on Disp. Resol. 19 (1999).

95. Carrie Menkel-Meadow, Ethics in ADR: The Many “C’s” of Professional Responsibility and Dispute Resolution, 28 Fordham Urb. L.J. 979 (2001).

96. Carrie Menkel-Meadow, Ethics and Professionalism in Non-Adversarial Lawyering, 27 Fla. St. U. L. Rev. 153 (1999); Menkel-Meadow, *supra* note 85; Carrie Menkel-Meadow, The Silences of the Restatement of the Law Governing Lawyers: Lawyering as Only Adversary Practice, 10 Geo. J. Legal Ethics 631 (1997).

97. Carrie Menkel-Meadow, Ethics in ADR Representation: A Road Map of Critical Issues, 4 Disp. Resol. Mag. 3 (1997).

98. See CPR-Georgetown Commission on Ethics and Standards in ADR, Proposed Model Rule for the Lawyer as Third Party Neutral (2002) and Principles for ADR Provider Organizations (2002), available at <<http://www.cpradr.org>>.

99. Carrie Menkel-Meadow, And Now a Word About Secular Humanism, Spirituality and the Practice of Justice and Conflict Resolution, 28 Fordham Urb. L.J. 1073 (2001).

100. Kathleen M. Scanlon, *Drafter's Deskbook for Dispute Resolution Clauses* (New York, 2002).

The Future of Dispute Processing and Conflict Resolution: Of Multiple Parties, Creative Solutions, and New Institutions for Resolving Conflict

As the twenty-first century has begun with some of the most horrific and seemingly insoluble conflicts before us as human beings, beyond the individual disputes and conflicts of lawsuits to “virtual” or “viral” conflicts both larger and more permeable than the nation-state, we will need all of the forms of conflict resolution we can muster to attempt a peaceful future for the human race. This seems a most propitious time for the further development of the field of conflict resolution.

For me, the hope to solve problems through conflict resolution has always seemed a sort of optimistic sensibility or leitmotiv, informing the way I look at conflicts at both the individual and international level. Decades of interdisciplinary study have given me hope that we are continuing to make progress on some key concepts—that we cannot solve problems with an exclusive focus on self-interest or top-down command, but must consider the needs, interests, and participation of others with whom we come into contact. I believe and hope that there are possibilities to create solutions and resources in lieu of destroying them in our interactions with each other. We must “create wealth” in the sense of enhanced human well-being if we are to continue to inhabit the planet with others who materially have less than we do. Sometimes we will need help from wise intervenors, and those wise intervenors can develop more knowledge about what is effective in their practice. I also believe that, while we need experts to help in conflict resolution, being able to truly participate in the decisions that affect our lives is a human necessity for legitimate societal outcomes and for peaceful coexistence of people with divergent values, so there is some tension between the aspirations of democratic participation and expert facilitation in conflict resolution theory and practice.

In the context of these large and general assertions there are many interesting and concrete intellectual and practical projects to pursue. As we recognize that many disputes now involve multiple parties (if even only the insurer in a conventional two-party plaintiff-defendant lawsuit and the increased use of class actions in a variety of legal contexts) and many issues, negotiation theorists have appropriately turned their attention to development of theory for multiparty, multiissue negotiations (drawn from legal, business, political, and international disputes and conflicts), studying such issues as coalition formation, group dynamics, negotiation in dynamic settings, the role of leadership and coordination, information processing, and the different dynamics of competition, collaboration, cooperation, and coordination in multiparty settings.¹⁰¹ This theory is currently being tested in such fora as negotiated rule making before administrative tribunals, in public policy settings,¹⁰² in commu-

101. James K. Sebenius, Sequencing to Build Coalitions: With Whom Should I Talk First? *in* *Wise Choices: Decisions, Games, and Negotiations*, eds. Richard J. Zeckhauser et al. (Boston, 1996); Cass R. Sunstein, Deliberative Trouble? Why Groups Go to Extremes, 110 *Yale L.J.* 71 (2000).

102. Susan Carpenter & W. J. D. Kennedy, *Managing Public Disputes: A Practical Guide for Professionals in Government, Business and Citizen Groups* (San Francisco, 2001); Consensus Building Handbook, *supra* note 46.

nity disputes, in truth and reconciliation commissions,¹⁰³ in public conversations and dialog projects all over the world,¹⁰⁴ as well as in new forms of conventional law courts, seeking multidisciplinary solutions to common problems (drugs, family dysfunction, etc.).¹⁰⁵

My own theoretical work has come to focus on how interdisciplinary conflict resolution theory can be reunited with legal and political theory, jurisprudence, and constitutional law to explore how these newer forms of conflict resolution and dispute processing can become perhaps a fifth branch of governance (beyond executive, legislative, judicial, and administrative) to a form of ad hoc democracy of participation by the acted-upon that marries modern democratic discourse theory to conflict resolution theory.¹⁰⁶ At the theoretical level, this work asks how we can form conflict resolution processes that enable all forms of human discourse to be “heard” in Hampshire’s terms. Can we create “space” for human communication that simultaneously allows for expression of (1) reasons, principles, and persuasion, (2) preference trading and bargaining, and (3) passions, emotions, and beliefs, and that can find a way for such expressions to enrich our understandings of each other and find ways of solving specific problems?

Can we find ways to address the more general problem of coexistence with varied and diverse needs and values?¹⁰⁷ These are the future process and jurisprudential issues—how can we develop processes that allow in and legitimate more than one form of discourse? Some new legal, governmental, and private processes are already experimenting with these multiple levels of discourse—negotiated rule making, problem-solving courts, and public conversations or dialogs to name a few.¹⁰⁸ New process institutions must be responsive to foundational process values of participation, assent, self-determination, and mutual responsiveness and respect, while aspiring to achieve both peace and justice. Many international efforts, like those in simple legal dispute mediation, now proceed at both “informal” and “formal” levels simultaneously. Two-track diplomacy plays out in the international arena as caucuses are used in private mediation, exploring both bottom-up, informal, private, and task-oriented problem solving, with more formal, facilitated, or orchestrated public, transparent, and joint meetings.

My own recent work attempts to organize and explicate the differences in process and process institutions that can be mapped according to the modes of discourse (principled reasons, bargaining, and emotions) and different

103. Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Boston, 1998); Susan Collin Marks, *Watching the Wind: Conflict Resolution During South Africa’s Transition to Democracy* (Washington, 2000); *Forgiveness and Reconciliation: Religion, Public Policy and Conflict Transformation*, eds. Raymond G. Helmick & Rodney Lawrence Petersen (Philadelphia, 2001).

104. See Search for Common Ground at <<http://www.sfcg.org>>.

105. Kaye, *supra* note 48.

106. Carrie Menkel-Meadow, *The Lawyer’s Role in Deliberative Democracy* (on file with author).

107. Lederach, *supra* note 15; Ackerman & Duvall, *supra* note 16; Herding Cats, *supra* note 33.

108. For some further examples, see Carrie Menkel-Meadow, *When Litigation Is Not the Only Way: Consensus Building and Mediation as Public Interest Lawyering*, 10 Wash. U. J.L. and Pol’y, 37 (2002).

forms of process (open/closed; plenary/committee; expert facilitator/leaderless(naturalistic) for different kinds of entities in conflict (permanent, constitutive, temporary/ad hoc), with some examples as indicated in the following chart.

Modes of Conflict Resolution			
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<i>Mode of discourse</i>	<i>Principles (reasons)</i>	<i>Bargaining (interests)</i>	<i>Passions (needs/emotions/religion)</i>
<i>Forms of process</i>			
Closed	Some court proceedings; arbitration	Negotiation—U.S. Constitution; diplomacy	Mediation (e.g., divorce)
Open	French Constitution; courts; arbitration	Public negotiations; some labor	Dialog movement
Plenary	French Constitution	Regulation—negotiation or negotiated rule-making	Town meetings
Committees	Faculty committees; task groups	U.S. Constitution/ U.S. Congress	Caucuses; interest groups
Expert—Facilitator	Consensus building	Minitrial	Public conversations
Naturalistic (leaderless)			Grassroots organizing/ WTO protests
Permanent	Government, institutions	Business organizations, unions	Religious organizations; Alcoholics Anonymous, Weight Watchers
Constitutive	U.N., national constitutions	National constitutions/ professional associations	Civil justice movements, peace
Temporary/ad hoc	Issue organizations/ social justice	Interest groups	Yippies, New Age, vigilantes
Principles = reasons, appeals to universalism, law Bargaining = interests, preferences, trading, compromises Open = public or transparent meetings or proceedings Closed = confidential, secret process or even outcomes (settlements) Plenary = full group participation, joint meetings Committees= task groups, caucuses, parts of the whole Expert—facilitator = led by expertise (process or substantive or both) Naturalistic = leaderless, grassroots, ad hoc Permanent (organizational, institutional) Constitutive (“constitutional”) Temporary/ad hoc groups or disputants			

At the substantive level, I think we have also learned that even in the largely generalist domain of law we need more multidisciplinary forms of problem solving. It is not enough to create new process institutions if we do not know what problems they are supposed to solve. In “Aha? Is Creativity Possible in

Legal Negotiation and Teachable in Legal Education?”¹⁰⁹ I explore how new scientific work in creativity¹¹⁰ and multiple forms of human intelligence¹¹¹ can be harnessed to legal problem solving to develop new legal concepts, tropes, entities, and solutions to legal problems if we can really learn to think outside of the box. Traditional legal thought, categories, remedies, and institutions have served us moderately well in the Anglo-American world, with well-developed constitutional (both written and unwritten), common law, and statutory solutions to many intra- and inter-national legal disputes. But these institutions and ways of thinking have also been limiting. (Some are focused on the past and are not flexible enough to adapt to rapidly changing social, scientific, and political conditions; others are too binary in how “truth” is established and how remedies can be awarded; still others exclude too many of the people whose lives are affected by decisions taken on their behalf, whether truly “representative” or not.) Some of these processes may not appeal to our human need for healing, or spiritual or ethical “wholeness,” or deeper values of human connection.

In the parable of the good camping trip that we now use to teach the value of human diversity, we are asked to consider whom we would want to take on a moderately arduous trek through the mountains. Clearly we need a map reader, navigator, astronomer, cook, storyteller, medical expert, botanist, wood cutter, animal lover (and tamer or hunter, should we encounter hostile forms of animal life), strong pack carriers, and perhaps a musician or clergy person for the campfire at day’s end. To whatever list any group makes up, I would now add a “conflict resolver” or “process expert” who would be able to handle, facilitate, and manage whatever internal conflicts such a diverse range of talent would inevitably encounter (until such time as all of us, as human beings, are “expert” in resolving our own conflicts, or at least have sufficient skills to do it on our own). We need many substantive (and creative) approaches to questions of survival; we also will need to coordinate how we reach solutions, answers, or agreements, even if they are only provisional, until dynamics change, or new information is learned.

Just as legal dispute resolution has begun to evolve from traditional adversary adjudication in the courts as the exclusive or preferred method for legal dispute resolution, human conflict resolution now requires a variety of substantive domains (science, physical, human, social, cultural, spiritual, artistic) to search for ways to create peace and justice. The outlines of new substantive ideas and solutions may still be obscure or illusory. The forms of process we can use to come together are more varied and interesting than ever before. We will need to develop new theory, experiment with new institutions, practices, and policies and then study and evaluate them for generalizability and applicability to new and different situations. Our very survival depends on it. What an exciting, if challenging, time to be a conflict resolution theorist, teacher, practitioner, and “process architect.”

109. Menkel-Meadow, *supra* note 12.

110. See Mihaly Csikszentmihalyi, *Creativity: Flow and the Psychology of Discovery and Invention* (New York, 1996); Barry Nalebuff & Ian Ayres, *Why Not? How to Use Everyday Ingenuity to Solve Problems Big and Small* (Boston, 2003).

111. Howard Gardner, *Intelligence Reframed* (New York, 1999); Howard Gardner, *Frames of Mind* (New York, 1983).